

**IN THE LESOTHO COURT OF APPEAL**

In the matter between:

**KANANELO TLEBERE**

**APPELLANT**

and

**LESOTHO TOURIST BOARD**

**RESPONDENT**

Held at:  
**MASERU**

Coram:  
**BROWDE. AJA**  
**LEON J.A.**  
**SHEARER. AJA**

**J U D G M E N T**

**LEON, JA**

It will be convenient to refer to the parties as the applicant and the respondent respectively.

In the Court a quo the applicant brought an urgent application against the respondent in which the following relief was sought:

- “1. Dispensing with the Rule of Court pertaining to modes and periods of service.
2. A Rule Nisi be and it is hereby issued returnable on the date and time to be determined by the Honourable Court calling upon the respondent to show cause (if any) why:
  - (a) The Deputy Sheriff shall not impound and keep in his custody the vehicle formerly Registration number A 7488 (now travelling on temporary registration numbers to applicant unknown) and engine number and Chassis number reflected in Annexure “H” to the Founding Affidavit pending finalisation of this application.
  - (b) The said vehicle shall not be returned to applicant together with its registration documents, and all its accessories.
  - (c) Applicant shall not be granted such further and/or alternative relief as this Honourable Court may deem meet.
  - (d) Respondent shall not be ordered to pay costs hereof.
3. Prayers 1 and 2(a) shall not operate with immediate effect as an interim order.”

On the 28th October 1997 the Rule Nisi was granted as prayed in the High

Court returnable on the 7th November 1997. The Respondent filed Notice of Intention to Oppose and also Notice of his Intention to anticipate the return date to the 6th November 1997. After the respondent had been given leave to file a supplementary affidavit the matter was argued and, a few days later, the learned Judge a quo issued what he referred to as a "Ruling" granting the application stating that his full reasons would follow.

We have now been furnished with those reasons. It is against that ruling and the subsequent judgment that the respondent has appealed.

Subject to one matter to which I shall refer later the facts in this matter are not seriously in dispute and may be summarised briefly as follows:

The respondent was employed by the applicant as its managing director commencing such employment on the 1st July 1994. The applicant has annexed to its papers annexure "C" which is headed "Managing Director's Car Scheme". In the introduction it is stated that the management has decided to introduce a new scheme altogether taking into consideration the comments by the Board of Directors.

In terms of annexure "C" it was proposed that the Managing Director be given the option to purchase the company car as part of his salary package. Annexure "C" was a proposal by the applicant.

In terms of the proposal the cost of the car to the Managing Director would be based on an average lifespan of a car being five years. This was based on a straight line depreciation of 20% per annum. The applicant would depreciate the vehicle over a three year period (60% of value) and the residual value (40%) is what the Managing Director would be expected to pay for the car. The last two sentences of the paragraph 2 of annexure "C" read:

"If the employment contract of the Managing Director (employee) shall be terminated by either party the Managing Director will be required to make good the ..... (two words were deleted). Should this occur before the end of three years the Managing Director may opt payment of the market value of the residual value at the time."

The transfer of ownership will be effected after the three years has been completed. Paragraph 3 reads:- **PRESENT STATUS**

Based on the present status this is how this would work out:

Car Purchase	M170,000
Annual depreciation 20%	34,000
3 year depreciation	102,000
Residual Value (40%)	68,000
Purchase price	<u>68,000</u>

Despite the unsatisfactory wording of annexure "C" it would seem that it was intended by the proposal that the Managing Director could have the car transferred into his name after he had completed three years in the position at the residual value which he would pay being 40% of the cost of the car.

At the foot of annexure "C" the following appears:

"Approved 7th April 1995 as amended".

On the 7th April 1995 an extraordinary meeting of the applicant's Board of Directors was held in which a number of matters were discussed. Item 3 on the agenda was the Managing Director's Car Scheme. The Minutes of that meeting on the topic read:-

"The Board considered the Managing Director's proposal and resolved that:

- (a) Should the Managing Director retain his post for a period beyond three years he should pay the residual value of the vehicle; but

- (b) Should his employment be terminated before the end of the three years he should pay the vehicle's market value at the time. The proposal was finally approved except for the latter part of paragraph four (4) thereof."

Paragraph 4 of the proposal reads:

"It is recommended that the Board should approve the above scheme and, *the employees spouse be permitted casual use of the car* (those words are deleted).

It is to be noted that annexure "D" is silent on whether the Managing Director could obtain a car at all if his employment is terminated at the end of three years.

On the 26 June 1997 the respondent wrote to the applicant a letter under the heading : K TLEBERE - TERMINAL BENEFITS. In the letter he thanks the respondent for a memo received by him on the previous day outlining all benefits due to him at the end of his contract on 30 June 1997. After stating such benefits the letter proceeds thus:

"You will note from the attached Board of Directors Meeting decision that if I completed my contract with the Lesotho Tourist Board I could buy the Managing Director's vehicle at its residual value. I therefore request that the amount of M75,012 as indicated in your

memo be deducted from my terminal benefits as full payment for the vehicle. I will therefore be expecting a balance of M12,902-77 as final settlement due to me.”

On 26 August 1997 the applicant wrote to the respondent informing him that at a meeting of its Board of Directors on the previous day it was decided that

“the transactions regarding your purchase of the Managing Director’s car have not been well done as the present Board was not consulted and agreed. As a result, I am directed to inform you that you should return the car for further consultation with the present Board of Directors.”

That suggestion was rejected by the respondent’s attorney on 1 September 1997.

In the meanwhile the respondent had already registered the vehicle in his name. The circumstances as to how that came about are referred to in the respondent’s supplementary affidavit and are not denied by the applicant. It is also common cause on the papers that the respondent completed his three year contract which was not renewed.

According to the answering affidavit on the 2nd July 1997 the Personnel officer who is also charged with transport management signed change of ownership

forms of the vehicle in favour of the respondent. On the 10th August 1997 the Finance and Administration Manager of the applicant wrote a letter to the local Interpol Branch of the Lesotho Mounted Police confirming that the vehicle had been purchased by the respondent.

On the 21st August 1997 on the letterhead of the respondent the Finance and Administration manager wrote a letter under the heading "To whom it may Concern" confirming that the vehicle in question had been sold by the applicant to the respondent who was employed as its managing director. To complete a summary of the correspondence, the respondent wrote to the applicant's acting managing director confirming that he had already registered the vehicle in his name.

It is the applicant's case that the respondent acted fraudulently because when he purportedly exercised his option he had not completed the period of three years as Managing Director. This point will be dealt with later. Secondly it is the applicant's case that he could not buy the vehicle at its market value as his contract had not terminated before the three years period; nor could he purchase it at its residual value as he had not held the position of Managing Director beyond the requisite three year period. The only avenue available to him was to go back to the Board of Directors and negotiate a contract of sale.



As I understand the judgment of the learned Judge a quo it is upon this latter basis that he granted the application.

The notice of appeal calls into question the learned Judge's interpretation of annexure "D". It is claimed that the learned Judge erred in holding that the applicant was entitled to the return of the vehicle and ought to have held that the applicant's claim should have been an action for payment of the balance of the purchase price. Estoppel is also relied upon in paragraph 7 of the Notice of Appeal where it is alleged that the applicant is estopped from denying the sale of the vehicle to the respondent. Reliance is placed on the resolution of the applicant's Board of Directors of the 4th June 1997. The minutes of that meeting are annexed to the respondent's answering affidavit. At the meeting the Board accepted the decision of the Minister of Tourism not to renew the respondent's contract. Item 3 of the Minutes state: "Arrangements be made to provide the Managing Director with his terminal benefits". Nothing is said about the vehicle.

The respondent has filed additional grounds of appeal which read as follows:

"10

10.1 The learned Judge a quo ought to have held that the Respondent had not discharged the onus (of) proving its case against the

appellant, and for this reason should have dismissed the application, together with costs;

alternatively:

10.2 The learned Judge a quo should have found that a dispute of fact existed which should have been referred to the hearing of oral evidence.

It is contended on behalf of the Respondent that the proper interpretation to be placed upon annexure "D" is that the respondent was entitled to purchase the motor vehicle at its residual value should he complete his three-year term under the contract and that the actions of the applicant's officials are consistent with such an interpretation. It is submitted that the applicant's interpretation would lead to an absurdity and was in clear conflict with the proposal (Annexure "C") which was approved as amended by annexure "D". It was accordingly argued that the interpretation contended for by the appellant was correct alternatively that the Minutes incorrectly record the Resolution taken by the applicant's directors.

Authorities were cited ( Grovenor v Dunswart Iron Works 1929 AD 299 A p 303; Scottish Union and National Insurance Co. Ltd v Native Recruiting Corporation Ltd 1934 AD 458 at pp 465-6; and Boerne v Harris

1949 (1) SA 793 (A) at pp 804-5) to the effect that where a document contains a clause which is either ambiguous or absurd the Court will depart from the plain meaning of the words so as to avoid the ambiguity or absurdity and give effect to the common intention of the parties.

Attention is drawn to the fact that none of those who attended the meeting on the 7th April 1995 have put up an affidavit, which is a suspicious circumstance.

Finally it is the respondent's contention that the probabilities are in his favour and the matter should be so resolved. Alternatively it is submitted that the court a quo should have directed that oral evidence should be heard as to whether or not the Board of Directors afforded the respondent the option of purchasing the motor vehicle in question at its residual value upon completion of his contract of employment. Oral evidence should be allowed, if there are reasonable grounds for doubting the correctness of the allegations made by the applicant as is the position in this case. (See Moosa Bros & Sons (Pty) Ltd vs Rajah 1975(4) SA 87 (1) at p G-H : Khumalo vs Director-General of Cooperation and Others 199 (1) SA 168 (A) at p 167 G- 168 (A).

Counsel for the applicant in his Heads of Argument has based his argument

partly on the assumption that the respondent's contract commenced on the 3rd June 1994 and terminated on the 4th June 1997. Even if he had an option he could not exercise it when he was no longer the Managing Director. This argument is totally devoid of substance. It is clear from the applicant's own papers (see paragraph 5 page 5) that the respondent commenced duties on the 1st July 1994 and his appointment would commence, according to annexure "A", when he commenced duties. The three year period would therefore expire on the 30th June 1997.

On behalf of the applicant it is also contended that annexure "D" was a policy decision and not an agreement to deliver the vehicle to the respondent. For the respondent to succeed he must show that there was a contract of sale between the parties but there was no such contract. Even if the respondent was granted an option he could not exercise it after he had ceased to be Managing Director. As I shall show later this argument must fail on the facts.

With regard to the question as to whether the Court a quo should have referred the matter for the hearing of oral evidence it is submitted on behalf of the applicant that there is no genuine dispute of fact with regard to the resolution contained in annexure "D". The dispute relates to the proper interpretation of that document.

This court expressed strong prima facie views in favour of the Respondent to Mr. Jeffreys when he appeared for the respondent and who accordingly argued the matter very briefly. But he indicated that the position with regard to the proper interpretation of Annexure "D" was so clear that it was not really necessary to consider the alternative argument that the matter be referred for the hearing of oral evidence.

Mr. Mosito, despite being subjected to strong and frequent interjections by the Court, resolutely stuck to his guns and was not in any way deflected from his submissions. However he did not press the point that the respondent had not completed three years of his contract and that when he wrote his letter of acceptance he was no longer the Managing Director.

I turn now to a discussion on the proper interpretation of Annexure "C" and "D". If one looks at Annexure "D" in splendid isolation and gives to it a literal interpretation it would mean that if the Managing Director retained his post for a period beyond the contractual period he would be entitled to purchase the motor vehicle at its residual value while if that person's employment was terminated before the end of the three year period he would be entitled to purchase the motor vehicle at its market value. However the Managing Director who duly completed his

contract at the end of three years and whose proposal was being considered would not be entitled to purchase the motor vehicle at all - such an interpretation is so absurd that it could not possibly reflect the intention of the parties.

Moreover it would not be proper to interpret Annexure "D" in isolation having regard to the fact that:-

- 1) The Board was considering the proposal in annexure "C".
- 2) It was also resolved that annexure "C" be approved as amended.

In order to give business efficacy to the resolution and in accordance with what I have said above it is necessary to look at annexure "C". That was a proposal by the Managing Director that on completion of his three year contract he would be given the option of purchasing the motor vehicle at its residual value (40%). That is what he would be required to pay if he exercised the option to purchase the motor vehicle on the termination of his three year contract. He exercised that option by writing the letter to which I have referred earlier herein.

It was that very proposal which came before the Board on the 7th April and

it was in respect of that proposal that Annexure "C" was approved (as amended). In order to give business efficacy to annexure "D" it must necessarily be implied that the Board also approved the Managing Director's proposal and that paragraph (a) in annexure "D" should be interpreted thus:-

"a) Should the Managing Director retain his post for a period of three years or beyond three years he should pay the residual value of the vehicle"

The other interpretation creates such an absurdity that it could never have been the intention of the parties whereas the one which I have suggested must have been that the common intention of the parties.

Mr. Mosito suggested that to adopt the above view would be to make a new contract for the parties. I do not agree. The interpretation which I have suggested removes the absurdity and gives effect to what must have been the common intention of the parties.

Then Mr. Mosito suggested that annexure "D" was a mere policy document. I do not agree. Annexure "D" was a resolution by the applicant as to what benefit

the Managing Director would be entitled to in respect of the motor vehicle upon the termination of his contract. It was an option given to the Managing Director to accept or refuse: it was for him to decide. Upon the exercise of the option the Managing Director would be entitled to purchase the motor vehicle at its residual value. A contract of sale would thus come into being.

Then Mr. Mosito urged that annexure "D" was a counter-offer. It was not. The position of the Managing Director was unaffected: It would be as set forth in annexure "C". However in addition other matters were provided for which had not been dealt with in annexure "C".

In my judgment the application should have been dismissed with costs. The appeal must be allowed with costs and the judgment of the court a quo be altered to read:-

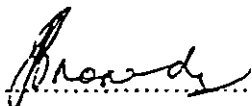
"Application dismissed with costs".



  
.....

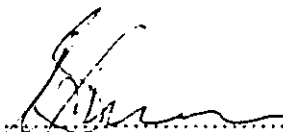
**R. N. LEÓN**  
**JUDGE OF APPEAL**

I AGREE

  
.....

**BROWDE**  
**ACTING JUDGE OF APPEAL**

I AGREE

  
.....

**SHEARER**  
**ACTING JUDGE OF APPEAL**

Judgment delivered at Maseru on the 4th Day of February 1998.

For Appellant : Mr. Matsau

For Respondent : Mr. Mosito